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No. 80-1408

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. The court of appeals' decision not to review the Commission's refusal to reject AT&T's Telpak termination tariff rested squarely and solely on its judgment that Telpak users could obtain "realistic" relief from AT&T's massive bulk rate increase by filing complaints against the remaining single-channel rates (ARINC Pet. App. 61 n.34). That view, however, is completely mistaken. The complaint of Telpak customers is that the carrier has massively increased bulk rates. With respect to this particular increase, the lawfulness of the distinct and different single-channel rates has, in the Commission's own words, "no relevance" (ARNIC Pet. App. 75).[1]

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[1]Contrary to AT&T's contention (Br. in Opp. 16 n.16), the futile complaint remedy against single-channel rates is analogous to a complaint against the 18-cent first-class postal rate by bulk mailers whose rates were to be greatly increased by abolition of lower bulk rates. See

The Commission and AT&T do not disagree, but instead offer justifications for the court of appeals' decision not given by the court itself. The Commission argues that its action is unreviewable because Telpak customers might ask it to establish a quantity discount (FCC Br. in Opp. 14 n.27). This is to counsel the initiation of a wholly new proceeding, which conflicts with the rationale of *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979). An agency's refusal to investigate a proposed rate increase is final and reviewable if an aggrieved customer cannot obtain meaningful relief by filing a subsequent complaint against that increase. *Id.* at 452-454.

AT&T does not even offer the cold comfort of a wholly new proceeding. Indeed, it contradicts the Commission and asserts that if single-channel rates are lawful, "that is all to which the Telpak users are entitled" (AT&T Br. in Opp. 14)—even if bulk rates would also be just and reasonable. This disagreement with the Commission shows that the case not only involves a misapplication of *Southern Railway* but also implicates the very power of a regulatory commission to prescribe a bulk rate over the objections of a carrier.

2. Respondents suggest that the Commission's refusal to apply 47 C.F.R. 61.38 was lawful. They also assert that, even if improper, it is not a ground for judicial review (FCC Br. in Opp. 13; AT&T Br. in Opp. 12). These contentions are again mistaken and again abandon the reasoning of the court of appeals. The court had no doubt that the Commission acted improperly in waiving its rule. It rightly said so in both of its opinions (ARINC Pet. App. 25-27, 66), for the Commission allowed AT&T to implement a massive bulk rate increase without providing any of the justifying data

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Pet. 9-10 n.13. The inadequacy of complaint relief is a fundamental problem for bulk users apart from the ratemaking question of whether the costs of providing bulk service are lower.

required by the Rules (*id.* at 25-27). The fact that the Commission, in another proceeding, had generated information about some single-channel rates (FCC Br. in Opp. 6 n.9; AT&T Br. in Opp. 12) is irrelevant. The Rules obliged AT&T to document its huge bulk rate increase, and that it never did.

Although the court of appeals ultimately concluded that the Commission's violations of its Rules provided no occasion for judicial review, it did so because of its belief that the complaint remedy eliminated the risk of substantial prejudice to Telpak users (ARINC Pet. App. 62). Since, however, there is exactly such a risk because of the futility of the complaint procedure, respondents abandon the court of appeals' rationale and argue instead that Rule 61.38 can confer no rights on users because it is solely for the Commission's benefit (FCC Br. in Opp. 13; AT&T Br. in Opp. 12). This contention flies in the face of the recognized importance under the Communications Act of informed public comment regarding rate increases. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538 (1970); *Amendment of Parts 0, 1, and 61*, 62 F.C.C. 2d 474, 476 (1976); *Amendment of Part 61*, 25 F.C.C. 2d 957, 968, 970-971 (1970).

3. Finally, AT&T argues that, seventeen years ago, the Commission ruled that Telpak and single-channel services have the same cost characteristics so that no bulk rate could be cost-justified (AT&T Br. in Opp. 15-16). Suffice it to say that the Commission itself makes no such claim and that, before the Commission, AT&T consistently contended that Telpak was compensatory, submitting evidence showing that Telpak had a higher rate of return than AT&T's other private line services (ARINC Pet. App. 154).

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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